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7 BANK OF NEW YORK AS SUCCESSOR TRUSTEE TO JPMORGAN  
CHASE BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR THE  
8 CERTIFICATEHOLDERS OF STRUCTURED ASSET MORTGAGE  
INVESTMENTS II INC. BEAR STEARNS ALT-A TRUST, MORTGAGE  
9 PASS-THROUGH CERTIFICATES SERIES 2005-7

10 UNITED STATES BANKRUPTCY COURT

11 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

12 In re

13 NICOLE CHRISTINA MCCONVILLE,

14 Debtor(s).

Case No.09-71561-LJT

Chapter 7

R.S. No. CJR-651

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DATE: March 19, 2010  
TIME: 11:00am  
CTRM: 201

19 1300 Clay Street, Suite 300  
Oakland, CA 94604-1426

20 The Bank of New York Mellon formerly known as The Bank of New York as successor  
21 Trustee to JPMorgan Chase Bank, National Association as Trustee for the Certificateholders of  
22 Structured Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust, Mortgage Pass-  
23 Through Certificates Series 2005-7 ("Movant"), moves this court for an order terminating the  
24 automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all  
25 acts necessary to enforce its security interest in real property generally described as 4169 Rettig  
26 Avenue, Oakland, California 94602.

27 On or about December 2, 2009, Nicole Christina McConville ("Debtor") filed a  
28 voluntary petition under Chapter 7 of the Bankruptcy Code, and Tevis Thompson was appointed

1 as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtor and  
2 the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

3 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and  
4 362(d)(2).

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **L.**

7 **MOVANT IS ENTITLED TO RELIEF FROM THE**  
**AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

8 **NO EQUITY**

10 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the  
11 debtor does not have any equity in the property and the property is not necessary to the debtor's  
12 effective reorganization.

13 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:  
14 § 362(d)(2) reflects congressional intent to allow creditors to  
immediately proceed against the property where the debtor has no  
15 equity and it is unnecessary to the reorganization, even where the  
debtor can provide adequate protection under § 362(d)(1).  
(Emphasis added).

16 Id. at 610 (emphasis added).

17 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court  
18 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all  
19 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief  
20 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194  
21 (9th Cir. 1984).

22 An appropriate cost of sale factor should also be added to determine if the debtor has  
23 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.  
24 283, 289 (Bankr. S.D. Cal. 1982).

25 On or about May 12, 2005, Debtor, for valuable consideration, made, executed and  
26 delivered to Silver State Financial Services, DBA Silver State Mortgage ("Lender") a Note in  
27 the principal sum of \$825,000.00 (the "Note"). Pursuant to the Note, Debtor is obligated to  
28 make monthly principal and interest payments commencing July 1, 2005, and continuing until

1 June 1, 2035, when all outstanding amounts are due and payable. The Note provides that, in the  
2 event of default, the holder of the Note has the option of declaring all unpaid sums immediately  
3 due and payable. A true and correct copy of the Note is attached to the Declaration in Support  
4 of Motion for Relief From Automatic Stay as exhibit A and incorporated herein by reference.

5 On or about May 12, 2005, the Debtor made, executed and delivered to Lender a Deed  
6 of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly  
7 described as 4169 Rettig Avenue, Oakland, California 94602 (the "Real Property"), which is  
8 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and  
9 costs incurred as a result of the Debtor's bankruptcy case may be included in the outstanding  
10 balance under the Note. The Deed of Trust was recorded on May 20, 2005, in the Official  
11 Records of Alameda County, State of California. A true and correct copy of the Deed of Trust is  
12 attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit B  
13 and incorporated herein by reference.

14 Subsequently, all beneficial interest in the Deed of Trust was sold, assigned and  
15 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust  
16 evidencing the Assignment of the Deed of Trust to Movant is attached to the Declaration in  
17 Support of Motion for Relief From Automatic Stay as exhibit C and incorporated herein by  
18 reference.

19 The obligation under the Note is in default as of September 1, 2008, for failure to make  
20 payments to Movant. As of January 26, 2010, the total obligation due and owing under the Note  
21 is in the approximate amount of \$900,333.35, representing the principal balance of  
22 \$798,660.65, interest in the sum of \$72,192.85, late charges in the amount of \$3,177.38, escrow  
23 advances in the amount of \$24,664.54, and a recoverable balance in the amount of \$1,637.93.  
24 This is an approximate amount for purposes of this Motion only, and should not be relied upon  
25 as such to pay off the subject loan as interest and additional advances may come due subsequent  
26 to the filing of the Motion. An exact payoff amount can be obtained by contacting Movant's  
27 counsel. Further, Movant has incurred additional post-petition attorneys' fees and costs in  
28 bringing the instant Motion. Moreover, the total arrears under the Note are in the approximate

1 sum of \$122,775.52, excluding the post-petition attorneys' fees and costs incurred in filing the  
2 instant Motion. A true and correct copy of the contractual payment accounting pursuant to  
3 Local Rule 4001-1(g)(1) is attached hereto as exhibit D and incorporated herein by reference.

II.

## **RELIEF FROM STAY**

## LACK OF EQUITY

Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and Statements, the fair market value of the Property is approximately \$605,000.00. True and correct copies of the Debtor's bankruptcy Schedules "A" and "D" are collectively attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit E and incorporated herein by reference.

Based on the above, Movant maintains that the equity in the Property is as follows:

13	Fair Market Value:	\$605,000.00
14	Less:	
	Movant's Trust Deed	\$900,333.35
	HomEQ Servicing's Trust Deed	\$217,698.00
	Costs of Sale (8%)	<u>\$48,400.00</u>
15	Equity in the Property:	\$<561,431.35>

17 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since  
18 this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is  
19 entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

20 Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real  
21 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtor's  
22 Statement of Intent is attached to the Declaration in Support of Motion for Relief From  
23 Automatic Stay as exhibit F and incorporated herein by reference.

24 | /././

25 | /././

26 | /././

27 | ./. /

III.

1                   **MOVANT IS ENTITLED TO RELIEF FROM THE**  
2                   **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

3                   **CAUSE - LACK OF ADEQUATE PROTECTION**

4                   Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to  
5 adequate protection of its interest in the Property.

6                   Movant submits that adequate protection in this case requires normal and periodic cash  
7 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed  
8 to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

9                   Movant is informed and believes that Debtor is presently unwilling or unable to provide  
10 adequate protection to the Movant and there is no probability that adequate protection can be  
11 afforded to Movant within a reasonable time.

12                  By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.  
13 § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

14                  WHEREFORE, Movant respectfully prays for an Order of this court as follows:

15                  1.         Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the  
16 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of  
17 Trust;

18                  2.         That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

19                  3.         Granting Movant leave to foreclose on the Real Property and to enforce the  
20 security interest under the Note and the Deed of Trust, including any action necessary to obtain  
21 possession of the Property;

22                  4.         Permitting Movant to offer and provide Debtor with information re: a potential  
23 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan  
24 Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;

25                  5.         Alternatively, in the event this court declines to grant Movant the relief requested  
26 above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to  
27 reinstate and maintain in a current condition all obligations due under the Note and Deed of  
28 Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations

1 to pay when due (a) the monthly installments of principal and interest, as required under the  
2 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor  
3 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs  
4 incurred in the filing of this motion;

5           6.       That the attorneys' fees and costs incurred by Movant for filing the instant Motion  
6 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy  
7 law; and

8           7. For such other and further relief as the court deems just and proper.

10 | Dated: March 1, 2010 PITE DUNCAN, LLP

/s/ CASPER J. RANKIN (CA SBN 249196)  
Attorneys for THE BANK OF  
NEW YORK MELLON  
FORMERLY KNOWN AS THE  
BANK OF NEW YORK AS  
SUCCESSOR TRUSTEE TO  
JPMORGAN CHASE BANK,  
NATIONAL ASSOCIATION  
AS TRUSTEE FOR THE  
CERTIFICATEHOLDERS OF  
STRUCTURED ASSET  
MORTGAGE INVESTMENTS  
II INC. BEAR STEARNS ALT-  
A TRUST, MORTGAGE PASS-  
THROUGH CERTIFICATES  
SERIES 2005-7